83-246

No.....

In The
Supreme Court of the United States
October Term, 1983

DAVID F. MACKEY,

Petitioner,

vs.

ROBERT V. GRAHAM, State Auditor, and THE STATE OF WASHINGTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

Petitioner was employed as a state examiner by the State Auditor's Office. He was discharged from his employment for failure to comply with a regulation which prohibited such employees from participating in an outside practice of auditing, accounting, tax work, or consulting.

ISSUE NO. I

Does the Respondents' regulation prohibiting the outside practice of accounting by certain state employees deprive the Appellant of his rights to pursue his chosen occupation and thus constitute a deprivation of property without due process under the Fourteenth Amendment to the United States Constitution?

ISSUE NO. II

Does the Respondents' regulation prohibiting the outside practice of accounting deprive the Appellant of a property right in violation of the equal protection clause of the Fifth Amendment as made applicable by the Fourteenth Amendment to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

GROUNDS FOR JURISDICTION

The Respondent, State Auditor, was granted summary judgment in the trial court. The Supreme Court of Washington upheld this decision in an opinion dated May 19, 1983. This decision upheld the regulation on the grounds that it was not repugnant to the United States Constitution.

This court has jurisdiction to review the judgment of the Washington State Supreme Court. This jurisdiction is conferred by 28 U. S. C. § 1257.

TEXT OF CONSTITUTIONAL PROVISIONS AND RELEVANT STATUTES AND REGULATIONS

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U. S. CONST. amend. XIV, § 1).

"Scope of chapter. The provisions of this chapter apply to:

• • •

(2) Each agency, and each employee and position therein, not expressly excluded or exempted under the provisions of RCW 41.06.070." (Wash. Rev. Code § 41.06.040 (1972)).

"... An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of employment. Incompatible duties include, but are not limited to:

• • •

"c. Outside practice of auditing, accounting, tax work or consulting." (Reg. 500.11.3.C).

STATEMENT OF THE CASE

At the time the suit arose, Appellant was employed as a full-time state examiner in the Respondent State

Auditor's Office. This position was a tenured civil service position under the laws of the State of Washington. At the same time, Appellant, as a licensed certified public accountant, was engaging in a part-time individual practice outside of working hours. Appellant restricted this practice in certain respects to avoid either a conflict of interest or the appearance of a conflict of interest. (See Appendix A.) Respondent, State Auditor, informed the Appellant that this outside practice was in contravention of Reg. 500.11.3.C, which regulation prohibited outside employment in the area of accounting. State examiners are permitted to own other types of businesses. (See Appendix A.) Some of these permitted outside businesses, such as home construction, are of such a nature as to require the filing of reports before regulatory state agencies within the audit responsibilities of the State Auditor's Office. (See Appendix A.) Home construction, despite this required supervision by the State Auditor's Office, is not a prohibited outside activity.

Appellant brought an action in the Superior Court for Thurston County, State of Washington, seeking a declaratory judgment which would prohibit the application of this regulation to the Appellant's outside practice. The Appellant's claim was based on the Fourteenth Amendment of the United States Constitution, and also on certain statutory interpretation questions and promissory estoppel issues which are not raised in this Petition for Certiorari. The trial court granted a summary judgment to the Respondent on the grounds that no material issue of fact existed. (See Appendix B.)

Appellant appealed the case to the Supreme Court of the State of Washington. The federal issue raised on

appeal was whether the application of this regulation to the Appellant violated the Appellant's due process rights under the Fourteenth Amendment to the United States Constitution. These issues were stated in the Appellant's assignments of error in the brief before the Supreme Court of Washington State. (See Appendix C.) The Supreme Court of Washington, in an opinion dated May 19, 1983, held that the regulation did not deprive state examiners of property without due process of law. (See Appendix D.) The Supreme Court affirmed the trial court's granting of summary judgment to the Respondent.

ARGUMENT

I.

Application of Reg. 500.11.3.C to Appellant deprived Appellant of his right to outside employment and also his right to his civil service employment without due process of law.

It is axiomatic that, to be protected by the due process clause of the Fourteenth Amendment, property rights must be based upon contract or agreement, or must be found in a statute, or in the United States Constitution and the rulings of the United States Supreme Court. It is Appellant's position that he had such a property right both in his tenured civil service position, and in his outside employment. Appellant's property right in his state job is based upon the statute under which Appellant received tenure, Wash. Rev. Code § 41.06.040 (1972). Appellant thus had a well-defined property right in his state employment which could not then be taken from him in

such an arbitrary manner as to violate minimum due process standards.

Furthermore, the Appellant possessed a property right in his outside employment. It is well established that the right to hold private employment and follow a chosen profession, free from unreasonable government interference, comes within the property concept of the Fourteenth Amendment. See *Trux v. Raich,* 239 U. S. 33 (1915); *Slochower v. Board of Education,* 350 U. S. 551 (1956); *Schware v. Board of Bar Examiners,* 353 U. S. 232 (1957); and *Dent v. West Virginia,* 129 U. S. 114 (1889). Thus, Appellant's right to outside employment was also a property right defined by this Supreme Court. The Washington State Supreme Court's decision to the contrary is in opposition to the United States Supreme Court cases cited above.

It is conceded that the state interest sought to be furthered by the regulation here at issue is a legitimate one. It is proper, of course, for the state to eliminate conflicts of interest among its employees. It is the Appellant's argument that the state has not chosen a constitutionally permissible way of furthering this laudable goal. The state has not chosen a means which is carefully tailored to eliminate conflicts of interest, yet preserve the employee's right to pursue non-conflicting, outside employment. The means is over-broad. All outside accounting and auditing practices are prohibited, regardless of whether a conflict of interest even appears to exist. There is not a minimally rational connection between the goal of eliminating conflicts of interest and an absolute prohibition to certain employees from pursuing their chosen vocations.

Further, there is no provision for a hearing to determine whether the employment actually causes a conflict of interest or even the possibility of a conflict of interest; thus, there are both substantive and procedural due process deprivations.

The unconstitutional deprivation of property is thus twofold under the regulation here at issue. A state examiner must either relinquish his right to tenured employment under the civil service with the State Auditor's Office, or he must relinquish his constitutionally protected right to pursue his vocation. This over-breadth in the regulation renders the regulation unconstitutional on its face, as depriving auditors who are tenured civil service employees of their constitutionally protected rights.

II.

The Regulation, both on its face and in application, is violative of the equal protection clause of the Fifth Amendment as made applicable by the Fourteenth Amendment.

In a case such as this, where the state seeks to distinguish certain classes for unequal treatment, the stated legislative purpose must be a legitimate one, and the means chosen to further that purpose must be at least rationally related to the purpose. This is a principle which has been laid down by this Court in cases far too numerous to detail in this Petition. See e. g., *Kotch v. Board of River Pilot Commissioners,* 330 U. S. 552 (1947); *U. S. Railroad Retirement Board v. Fritz,* 449 U. S. 166 (1980); *Minnesota v. Clover Leaf Creamery Co.,* 449 U. S. 456 (1981); *Schweiker v. Wilson,* 450 U. S. 221 (1981).

The regulation here at issue fails to achieve even a minimally rational fit between the end sought to be achieved and the means which is chosen to achieve it. Although the legislative purpose is concededly an important one (prohibiting conflicts of interest), the means chosen is over-broad. The prohibition of all outside auditing activities by state employees is clearly irrelevant to the goals sought to be achieved. As mentioned in the Statement of Facts, state examiners are not prohibited from running a home construction business, a business that is regulated in part by the State Auditor's Office. Thus, the regulation here at issue would prevent a state examiner from preparing a neighbor's federal tax return for a fee, yet would allow that same examiner to participate in and prepare returns for a business which his own state office must supervise and regulate. The classification imposed by the regulation, drawing a distinction between those who seek outside employment as certified public accountants, and those who seek employment in businesses regulated by the State Auditor's Office, is clearly arbitrary and irrelevant to the stated role of the legislation.

"The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Logan v. Zimmerman Brush Company,* 455 U. S. 422 (1982) (Opinion of Blackmun, J.). The Appellant argues that the fit of this regulation has no objective basis whatever. The decision of the Washington State Supreme Court upholding the regulation was in contravention of this Court's decisions in the cases cited above.

———o———

CONCLUSION

The decision of the Washington State Supreme Court is in conflict with certain decisions of this Court. The regulation claimed to be unconstitutional is still in existence. It is still being applied. This Court should grant a Writ of Certiorari in this case to resolve the conflicts between the Washington State Supreme Court's opinion and the decisions of this Court.

Respectfully submitted,

FULLER & FULLER

By: HERBERT H. FULLER
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APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 80-2-00008-7

DAVID MACKEY,

Plaintiff,

and,

BURR ELLIOT,

Intervenor,

vs.

ROBERT GRAHAM, State Auditor,

Defendant.

AFFIDAVIT

DAVID MACKEY, being first duly sworn, on oath deposes and says:

1. I do not engage in the general practice of accounting in the usual sense due to the fact that I have restricted my practice in certain important respects to avoid both a conflict of interest or the appearance of a conflict of interest. The nature of my outside work could be shown by way of testimony at time of trial.

2. The following is in response to the affidavit of Galen Jacobsen:

(Page 2, lines 9-12)

I was performing outside services (tax and data processing) in addition to State employment. These services are recognized by the AICPA *as accounting services.* You

don't have to be licensed as a CPA, LPA or PA to perform them in this state. See phone book: many unlicensed people call themselves accountants.

(Page 2, lines 12-15)

Mr. Jacobsen's memory seems extraordinarily dim in view of our discussions prior to employment and as reported in response to Husk Affidavit. I sat for the CPA exam in November, 1973 and told Galen I did and that my plans were to become certified and to open a CPA practice on a part-time basis. Since I could retire with 30 years service at age 52, I told Mr. Jacobsen (& Mr. Curnutt) that it was important to me to slowly develope a practice that I could go into upon retirement from State service. I told them specifically, many times, that I wouldn't work for any agency that would not allow this.

Mr. Jacobsen and Mr. Curnutt advised me that as long as I didn't take clients with state contracts and didn't handle any clients in conflict with my audit assignment, outside practice of accountancy would be permitted.

One facet of our discussions was very important: there was absolutely no need to discuss any form of outside employment other than accounting and Mr. Jacobsen admits to discussing outside employment. It was a well-known fact that State Examiners were engaged in a wide variety of business practices. I simply wanted assurance that my particular form of outside employment was alright.

(Page 2, lines 21-24)

I do not think Mr. Jacobsen was aware of any instance in which an examiner was *denied* the right to practice public accounting.

3. The following is in response to the affidavit of James Curnutt:

(All comments in response to Galen Jacobsen's affidavit are applicable to Mr. Curnutt.)

(Page 2, lines 11 thru 13)

Mr. Curnutt says he has no recollection that accountancy was specified as the outside practice. By memo to Galen Jacobsen of May 22, 1979 he said:

> "At the time Dave talked to you and to me about transferring from the Department of Natural Resources to the SAO he made it a condition of employment that he be permitted to continue his outside employment. You, he and I reviewed the DDA' Code of Ethics, then in effect, and we agreed among ourselves that *his outside accounting service work* would not conflict with the DDA' Code." (Emphasis supplied.)

The above writing—which drew no negative response from Mr. Jacobsen—clearly shows that Messrs. Curnutt and Jacobsen were well aware that we were discussing accountancy and did, in fact, agree to same.

As Mr. Graham's appointed agents, they had every authority—particularily in the eyes of a prospective employee—to make this agreement.

4. The following is in response to the affidavit of Richard L. Husk:

(Page 2, lines 13-20)

Except for the date,

I contend that Mr. Husk's memory is entirely faulty regarding our discussion. Rather than telling me the

practice of accounting was not permitted, he said that I should "check the policy manual on it." I suggested that we read the manual together. We did. Mr. Husk was startled to find no prohibition of accounting practice in it!

I advised Mr. Husk that if "he or Bob (Mr. Graham) didn't want me to start a practice to simply say so." I wouldn't start one if that was the case and I didn't care that the manual didn't cover it. I tried repeatedly to get a definite statement from Mr. Husk. He wouldn't make one. I told him particularly to advise me before I made any commitments to anyone. It was agreed between us that I would take the question to Division Chief, Galen Jacobsen, and have him bring it up to Mr. Graham for decision.

I left Mr. Husk's office, went directly to Mr. Jacobsen and requested as outlined above. He said he would do this. I checked with him again in May (1977) and again in July. On both occasions, he said that a decision had yet to be reached. Finally, in August, I went to Mr. Jacobsen and told him that I had to order my business phone at once if my name were to appear in the classified section. He said no official position would ever be taken and that I might as well go ahead. He indicated trust in my judgment to avoid all possibility of appearance of interest conflict. Accordingly, I followed Mr. Jacobsen's advice and went ahead to open my limited practice (as of September 1, 1977).

(Page 2, lines 25 and 26)

Mr. Husk claims no knowledge of my practice. He was advised about it per the above and per my filing of

conflict of interest statement on January 1, 1978. See response to R. V. Graham affidavit.

5. The following is in response to the affidavit of Robert V. Graham:

(Page 2, lines 9 thru 16)

Mr. Graham states that the appearance of independence must be maintained and that he has "always considered such outside employment (in accountancy) to be contrary to the public interest."

If this were so, as a dedicated and capable administrator, Mr. Graham would have to proscribe such activities without room for compromise. However, he did put the regulation 500.11.3.C up to a *vote* of his executive staff.

In addition, his policy allows activities wherein the State Examiners in various types of businesses, such as home construction, are required to file reports before regulatory State Agencies within the audit responsibility of the State Auditor's Office. These owner-examiners are certainly not independent from their own businesses. As a practicing CPA, however, I maintain independence from my clients.

(Page 3, lines 7 and 8)

Mr. Graham indicates here that he was advised of my practice in October, 1978. Actually, months earlier on January 18, 1978, I formally notified Mr. Graham of my involvement in public accounting by filing a conflict of interest statement as required. In the intervening months neither Mr. Graham nor his staff contacted me on this matter and, in fact, never contacted me until more than a year after that filing.

/s/ David Mackey

SUBSCRIBED AND SWORN to before me this 14 day of July, 1980.

/s/ Herbert H. Fuller
NOTARY PUBLIC in and for the State of Washington, residing at Union.

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 80 2 00008 7

DAVID F. MACKEY,

Plaintiff,

v.

BURR B. ELLIOTT, JR.,

Intervenor,

v.

ROBERT V. GRAHAM, State Auditor, and the
STATE OF WASHINGTON,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF DEFENDANTS

THIS MATTER came on for hearing before the Honorable Frank E. Baker upon defendants' motion and intervenor's cross-motion for summary judgment. Plaintiff Mackey was represented by Herbert H. Fuller, Attorney at Law; intervenor Elliott was represented by Edward E. Younglove, Attorney at Law; and defendants Robert V. Graham and the State of Washington were represented by Robert F. Hauth, Senior Assistant Attorney General and James Tuttle, Assistant Attorney General. The court having reviewed the entire record, including but not limited to pleadings, affidavits and briefs filed herein, having heard oral arguments and having determined that

there are no genuine issues of fact involved in the case and that defendants are entitled to judgment as a matter of law, and having given his oral memorandum opinion to that effect, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Defendants' motion for summary judgment is granted.

(a) Plaintiff's complaint and intervenor's complaint in intervention are each dismissed with prejudice.

(b) Regulation 500.11,3,c is a lawful exercise of authority by the state auditor as an agency head.

(c) Neither plaintiff nor intervenor has a right to conduct the outside practice of auditing, accounting, tax work or consulting contrary to the terms of Regulation 500.11,3,c.

(d) The outside business practice which plaintiff presently conducts and seeks to continue conducting, as alleged in this suit, violates Regulation 500.11, 3,c.

(e) The outside business activities which intervenor has conducted and seeks to conduct, as alleged in this suit, violate Regulation 500.11,3,c.

(2) Intervenor's alternative motion for summary judgment is denied.

DATED this 14th day of November, 1980.

/s/ Frank E. Baker
FRANK E. BAKER, Judge

Presented by:

SLADE GORTON
Attorney General

ROBERT F. HAUTH
Sr. Asst. Atty. Gen.
Attorneys for Defendants

Approved as to form and
Notice of Presentation Waived:

HERBERT H. FULLER
Attorney for Plaintiff

EDWARD E. YOUNGLOVE
Attorney for Intervenor

APPENDIX C

NO. 5217-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION NO. II

DAVID F. MACKEY,

Appellant,

v.

ROBERT V. GRAHAM, State Auditor, and the STATE OF WASHINGTON,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF THURSTON COUNTY

The Honorable Frank Baker, Judge

BRIEF OF APPELLANT
(Filed June 22, 1981)

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ASSIGNMENTS OF ERROR

The trial court erred in entering the order of November 14, 1980, granting respondent's motion for summary judgment.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did respondent have the authority to promulgate regulations forbidding appellant from maintaining an outside limited accounting practice?

2. Does respondent's regulation prohibiting the outside practice of accounting deprive appellant of his right to pursue his chosen occupation and thus constitute a deprivation of property without due process in violation of the Fourteenth amendment of the United States Constitution?

3. Where the agents of respondent made specific representations to the appellant to the effect that he could carry on a limited outside accounting practice, were the respondents estopped from applying regulation 500.11?

4. In view of the genuine issues as to material facts herein, was this matter not ripe for summary judgment?

APPENDIX D

[No. 48760-0. En Banc. May 19, 1983.]
DAVID F. MACKEY, *Appellant*, v. ROBERT V. GRAHAM, *as Auditor*, ET AL,

Respondents.

[1] States—Public Employment—Conflict of Interest—Prohibition of Private Employment. Under RCW 42.18.250, which authorizes state agency heads to protect against actual or potential conflicts of interest, a state employee may be prohibited from engaging in private employment which is inconsistent with his duties as a public employee.

[2] Constitutional Law—Due Process—Property Interest—Proof. The existence of a due process property interest depends upon the claimant's having a legitimate claim of entitlement based upon either a mutually explicit understanding or an express or implied contract.

[3] Administrative Law and Procedure—Administrative Rules—Validity—Relationship with Statute. Regulations are within the rulemaking authority of an agency if a rational relationship exists between the regulations and the statutory purposes they are implementing.

[4] Judgment—Summary Judgment—Averment of Specific Facts—Necessity. Unsupported allegations in a pleading are not sufficient by themselves to withstand a motion for a summary judgment; the nonmoving party must set forth the factual evidence upon which he relies.

ROSELLINI, J., did not participate in the disposition of this case.

Nature of Action: An employee of the State Auditor challenged regulations prohibiting incompatible outside employment.

Superior Court: The Superior Court for Thurston County, No. 80-2-00008-7, Frank E. Baker, J., granted a summary judgment upholding the regulations on November 14, 1980.

Supreme Court: Holding that the regulations were within the Auditor's statutory authority and did not deprive the plaintiff of property without due process of law, the court *affirms* the judgment.

Herbert H. Fuller and *Jay Fuller* (of *Fuller, Barckley & Morgan*), for appellant.

Kenneth O. Eikenberry, Attorney General, and *Robert F. Hauth, Special Assistant,* for respondents.

Brachtenbach, J.—This case concerns the authority of the State Auditor to prohibit employee state examiners from engaging in the private practice of accounting. Although "state examiner" is not explicitly defined in the statute, the position may be characterized in general terms as an assistant to the Auditor, for the purposes of auditing both local public offices, RCW 43.09.260, and other state departments, RCW 43.09.300. Appellant was a full-time state examiner with the Auditor's office from 1974 until 1981. In 1977 he passed the certified public accountant examination and opened a part-time private accounting practice.

Respondent is the Washington State Auditor. Among his duties is the prevention of conflicts of interest on the part of agency employees, RCW 42.18.250. As one means of preventing such conflicts, the Auditor's office has maintained a policy, initially informal but subsequently incorporated as regulations in an Employee Handbook, against

incompatible private sector employment. The Auditor learned that appellant was engaged in a part-time private accounting practice and informed him that such practice was prohibited. Appellant responded by filing suit in Thurston County to have the Department regulations declared invalid. The Thurston County Superior Court granted the State's Summary Judgment Motion and dismissed the suit. Mr. Mackey appealed that decision to Division Two of the Court of Appeals, which certified the case to this court. We affirm the trial court decision.

[1] The primary issue is whether the Auditor had statutory authority to promulgate regulations that prohibited state examiners from engaging in the private practice of accounting. This issue involves interpreting RCW 42.18.250, the provisions that govern an agency head's responsibility for protecting against actual or potential conflicts of interest on the part of agency employees. The statute provides:

> (1) Each agency head shall be responsible for the establishment of appropriate standards within his agency to protect against actual or potential conflicts of interest on the part of employees of his agency, and for the administration and enforcement within his agency of this chapter and the regulations and orders issued hereunder.
>
> (2) Each agency head may, subject to the regulations issued by the governor under RCW 42.18.240(2) issue regulations carrying out the policies and purposes of this chapter as applied to his agency. He shall file copies of all such regulations with the office of the governor.

This statute explicitly authorizes the Auditor to promulgate and enforce regulations that ensure employees are not faced with actual or potential conflicts of interest.

The head of an agency is particularly aware of potential conflicts facing department employees and is in a position to implement effective regulations that identify problem areas. Here, the Auditor promulgated regulations prohibiting outside employment that was incompatible with a state employee's duties. These regulations evolved from a series of policy manuals issued by the Auditor to provide guidelines for employee conduct. Clerk's Papers, at 28, 32. The various regulations and policy statements address some of the ethical conduct appropriate for employees charged with monitoring the accounting practices and financial transactions of other state and local public offices. In October of 1978, the regulations at issue here were promulgated as an "Employee Handbook" that included section 500.11.3.c, a specific prohibition against the "[o]utside practice of auditing, accounting, tax work or consulting." Clerk's Papers, at 42. As such, the regulations address the precise conflict of interest presented in this case. We hold the regulations are authorized under RCW 42.18.250.

[2] Since the regulations were within the Auditor's statutory authority, a second issue is whether the regulations nonetheless deprived state examiners of property without due process of law. A property interest will be recognized only when based upon a legitimate claim of entitlement. *Ritter v. Board of Comm'rs,* 96 Wn. 2d 503, 509, 637 P. 2d 940 (1981). Such a due process property interest exists " 'if there are such rules or mutually explicit understandings that support [an individual's] claim of entitlement to the benefit . . .' *Perry v. Sindermann,* 408 U. S. 593, 601, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972)". The *Ritter* court also stated that such a property interest could

rest on an express or implied contract. *Ritter*, at 509. In the present case, those requisite factors are not present. Although appellant raises some promissory estoppel allegations, the facts do not support the kind of legitimate claim of entitlement described in the opinions. There was no mutually explicit understanding between the parties that appellant could engage in the private practice of accounting. Similarly, the facts do not indicate any type of contractual arrangement.

[3] Appellant also contends that since the regulations constitute an absolute prohibition, the means are not rationally related to the admittedly legitimate end of avoiding conflicts of interest. The regulations, however, only prohibit outside employment that is "incompatible", *i.e.*, the "outside practice of auditing, accounting, tax work or consulting." Subject to some time limitations, the regulations permit employees to engage in outside businesses that are not likely to present conflicts. Accordingly, the regulations are rationally related to the statutory purpose of preventing conflicts of interest. Moreover, courts have upheld even absolute prohibitions against outside employment. *See Gosney v. Sonora Indep. Sch. Dist.*, 603 F. 2d 522 (5th Cir. 1979). In *Gosney* the court ruled that school board regulations prohibiting any outside employment by school board personnel were enforceable. The court reasoned that the regulations were reasonably related to the legitimate state interest in ensuring that employees devote their professional efforts to the education of students. *Gosney*, at 525 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 487-88, 99 L. Ed. 563, 75 S. Ct. 461 (1955)). In the instant case, the State Auditor is applying a less restrictive regulation with a more persuasive

public policy justification. Therefore, we hold that the regulations do not deprive appellant of property without due process of law.

[4] Finally, there are questions about the adequacy of the factual record. Although appellant presented a promissory estoppel argument, the record does not indicate that he satisfied his burden as to the facts necessary to establish the elements of that theory. *State v. Charlton*, 71 Wn. 2d 748, 751, 430 P. 2d 977 (1967). The record is not sufficient, in part, because the State submitted several affidavits denying the existence of any facts supporting the estoppel theory, yet counsel for appellant did not submit any affidavits either countering those denials or offering factual allegations in support of the theory. Similarly, appellant opposed the summary judgment motion, but his attorney submitted no affidavits to demonstrate a genuine issue of material fact. A party seeking to avoid summary judgment cannot simply rest upon the allegations of his pleadings, he must affirmatively present the factual evidence upon which he relies. *Leland v. Frogge*, 71 Wn. 2d 197, 200-01, 427 P. 2d 724 (1967); *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 770, 657 P. 2d 804 (1983). CR 56(e).

The trial court is affirmed.

WILLIAMS, C.J., STAFFORD, UTTER, DOLLIVER, DORE, DIMMICK, and PEARSON, JJ., and CUNNINGHAM, J. Pro Tem., concur.